

APPEAL NO. 010802

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 19, 2001. The hearing officer resolved the disputed issue by determining that the appellant (claimant) did not have disability from October 8, 1997, through March 19, 2001. He announced that he would not go back into a period of time that was the subject of a prior hearings decision which was, in turn, reversed by the District Court.

The claimant appeals and seeks reversal arguing that the hearing officer erred by not finding that the claimant had disability for the period of time after October 7, 1997. The respondent (carrier) responds and requests that the Appeals Panel affirm the decision and order of the hearing officer in all respects as it is supported by “overwhelming” evidence.

DECISION

Reversed and remanded.

Previous hearing decision and order. In a CCH held on October 7, 1997, hearing officer (hearing officer no. 1) determined that the claimant did not sustain a compensable injury on _____; that he did not timely notify his employer of his injury; and that he did not have resulting disability from March 26, 1996, through October 7, 1997. Hearing officer no.1 made specific factual findings as to each of the issues, one of which was:

Claimant was able to obtain and retain employment at wages equivalent to his preinjury wage at all times after the accident of _____.

Hearing officer no. 1 also found that the claimant had been hired a second time by the employer and had worked for the period from September 1996 until November 8, 1996. He further found that the claimant's average weekly wage (AWW) was \$1,270.89. In his conclusion of law, hearing officer no. 1 stated that because of untimely notice and the fact that the claimant was able to obtain and retain employment, the claimant did not have disability.

The Appeals Panel affirmed the decision and order of hearing officer no. 1. Although a copy is not in the record, the hearing officer at the March 19, 2001, CCH took official notice of “[a]ll prior proceedings in this matter in the Texas Workers' Compensation Commission [Commission] dispute resolution and appeal process.”¹

Judicial review of previous decision and order. The claimant appealed the Appeals Panel opinion to the District Court, where the jury returned a verdict favorable to

¹ We have before stated that copies of officially noticed portions of a claims file should be included in the record of the hearing as opposed to global references to an undetermined number of records in the custody of the Commission.

the claimant, reversing the Appeals Panel on questions of timely notice and existence of disability. The determination of the disability issue, as recited in the judgement, is:

Question No. 2:

Do you find that [claimant] has shown by a preponderance of the evidence that the [Commission] was wrong in finding that he did not sustain disability as a result of a _____, compensable injury? Answer "Yes" or "No."

ANSWER: Yes

The jury made no findings as to the duration of disability, with this statement in the District Court judgment that the issue be remanded back to the Commission:

Prior to the submission of this matter to the jury, the parties stipulated that due to the complexity of the Rules of the Commission concerning the amount of disability due [claimant] that it would be appropriate to submit the issue of the duration of disability to the [Commission]. The parties further stipulated that if the Commission refused to accept jurisdiction on the issue of the duration of disability, that the matter would then be submitted to this Court for the determination of that issue.

The District Court then ordered the matter back to the Commission for resolution, by an order signed on September 8, 2000.

Procedural history of the present hearing. The proceedings leading to the CCH under appeal here were then initiated. The benefit review officer, at a November 14, 2000, benefit review conference (BRC), recommended that the Commission had lost jurisdiction over the disability issue from the date of injury until the date of hearing officer no. 1's decision and order (dated October 13, 1997). The BRC report further stated that the claimant "failed to establish disability from that date to the present." The claimant's position at the BRC was that he was unable to earn wages equal to his preinjury wage "from 3/26/96 through the present."

The March 19, 2001, CCH. The previous CCH was held on October 7, 1997, and the evidence closed on that date. The hearing officer, at the beginning of the March 19, 2001, CCH, announced that he would not consider the period of time covered by the first decision, which he erroneously stated would include the date of the injury through October 13, 1997 (the date the decision was signed rather than when the CCH was held). He did not recite the District Court decision as the basis, but stated:

. . . because there was a prior decision and order in this case in which the hearing officer at that time specifically determined that there was no disability at least until the time of that decision and order on October 13, 1997, I am

considering that to be a final [sic] and, therefore, I am not going to accept or hear evidence prior to October 13 of 1997.

He refused to accept jurisdiction of the time period adjudicated by hearing officer no. 1 and would consider only the period of time after that. Neither party has appealed this action. Therefore, we need not further address the existence of disability in this period.

Evidence adduced at the CCH. It was stipulated by the parties that the date of statutory maximum medical improvement (MMI) in this case was March 26, 1998.² Stipulations were also made that a previous decision and order had been made by hearing officer no. 1 and appealed to the District Court, with a jury verdict returned in favor of the claimant.

The claimant testified that he had been unable to work since October 13, 1997, due to pain in his back. He agreed, however, that he had done calf roping and horseback riding at unspecified times after June 1998 or June 1999. He said that he roped about once a month and did not practice, and that five or six rides was hard on his back. The claimant's back was adjusted by a chiropractor after he rode. The claimant won a truck in a roping competition in August 2000.

The claimant agreed that he had an accident with a forklift in September 1996 and a stroke in August 1997. He stated that the stroke affected his ability to work. According to the claimant, the main symptom from his back injury, for the period from October 13, 1997, through March 26, 1998, was that his spine would not stay in line, causing his muscles to spasm. He said that he had not looked for work because he suspected no one would hire him with a back injury. The claimant denied the truth of statements he made on an application for unemployment compensation benefits which listed employers he had after his date of injury. He explained this and his statements of willingness to work in terms of doing what he had to do to bring in income. The claimant received unemployment compensation benefits through November 1997. The claimant said that he lived at a friend's horse ranch and served as night watchman for room and board only. He said that he had never told a doctor that he worked there. Medical records in evidence show that on March 23, 1999, the claimant was reported by Dr. V as having an internal disc disruption at L4-5.

Notwithstanding that the hearing officer said he would not consider time periods prior to October 13, 1997, a good deal of the carrier's case involved exploring facts prior to that time. When objection was made to this line of questioning, the carrier asserted that it was part of a "sole cause" defense. Asked to consider this, the hearing officer noted at first that sole cause had not been raised as an issue, then he recessed. He then returned and said:

²However, the actual date would appear to be March 30, 1998, the point of 104 weeks from the date that income benefits accrued.

. . . I have determined . . . there is a possibility that the period of disability that the jury found could have been one or two days immediately following the injury on _____ and that could be the disability they found and that the current disability from the date of this subsequent injury to the present could have been the result of the subsequent injury and, therefore, the carrier can go into those subsequent injuries.

The present decision. The parties stipulated as to the existence of the previous hearings decision as well as its appeal and reversal by the District Court. The hearing officer stated that he would consider disability only for time periods after that previous decision. However, the hearing officer in this case made the following findings of fact:

2. In the previous Decision and Order in this case, dated October 13, 1997, specific findings of fact were made by the Hearing Officer that Claimant did not sustain any disability, beginning on the date of the injury and continuing through the date of the previous hearing.
3. The previous Decision and Order was affirmed by the [Commission] Appeals Panel.

It is immediately after this that the hearing officer makes a finding of fact that the claimant was not unable to obtain or retain employment at wages equivalent to his preinjury wage beginning October 8, 1997, and continuing through the date of the CCH. There are no findings of fact regarding any other evidence relating to the period of time between the date of the last CCH and the date of statutory MMI.

In our opinion, the unappealed District Court decision is res judicata on the existence of disability for only the period from March 26, 1996, through October 7, 1997. While there appears to have been an incomplete resolution of that matter at the district court level, there is no provision in the 1989 Act for a remand, even by agreement, of issues to the Commission by the District Court.

We note that the issue and, consequently, the hearing officer's findings are that the claimant did not have an inability to work from October 7, 1997, "through the date of this hearing." However, the parties stipulated that the statutory MMI date was March 26, 1998. While MMI and disability are distinct issues, the issues considered at a CCH should have some reasonable relationship to the payment of benefits under the 1989 Act. The issue of disability is relevant to temporary income benefits (TIBs), and not to other types of income benefits for which an injured worker may be eligible. Advisory opinions on the ability or inability to work should not be sought for periods that could impact entitlement to other types of income benefits.

The only period for which the existence of "disability" was relevant for purposes of potential liability for TIBs ended at statutory MMI. In the absence of more specific fact findings as to what the hearing officer considered (apart from the first CCH decision and

Appeals Panel affirmance), we have reviewed the discussion and observe that nearly all the evidence recited by the hearing officer occurred well after the date of statutory MMI. However, the fact that the claimant won a calf-roping prize in August 2000 and had a medium-duty functional capacity evaluation in February 2001 would appear to be of remote relevance for determining disability for a period of time some two and one-half years earlier. If the hearing officer determined that a sole cause burden of proof was met, it was not indicated in this decision.

Finally, it appears that the hearing officer may have erred in applying the definition of disability set forth in Section 401.011(16). The hearing officer comments in his decision on the fact that the claimant was receiving room and board in return for his services as a watchman. However, the fact that an injured worker may have some earnings after the date of his injury is not dispositive of the existence of disability. Rather, the question is whether, due to a compensable injury, the worker was unable to "obtain and retain employment at wages equivalent to the pre-injury wage." Thus, although the claimant may have received room and board as compensation for night watchman duties, disability could still exist if this "in kind wage" were not equivalent to the preinjury AWW (found by hearing officer no. 1 to be \$1,270.89 per week). Social security disability, expressly commented upon by the hearing officer in his decision, is not "earnings" that can be considered in the comparison of pre- and postinjury wages.

For these reasons, plus the fact that the hearing officer appears to have relied on fact findings made in the earlier decision which was set aside by the District Court, the decision is reversed and the matter remanded for further consideration and application of the definition of disability to the evidence for the period after October 7, 1997, to the statutory MMI date. The hearing officer should consider amending the disability issue to match this period. The hearing officer should evaluate the evidence for this period without regard to the previous CCH or the District Court holding and make findings of fact which address the period of time after the date of the first CCH to the date of statutory MMI.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is

received from the Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge